

Appendix J

Draft Section 106 Memorandum of Agreement



**MEMORANDUM OF AGREEMENT
BETWEEN
THE FEDERAL TRANSIT ADMINISTRATION,
THE WASHINGTON STATE HISTORIC PRESERVATION OFFICER,
ADVISORY COUNCIL ON HISTORIC PRESERVATION,
UNITED STATES ARMY CORPS OF ENGINEERS,
AND WASHINGTON STATE DEPARTMENT OF TRANSPORTATION**

**PURSUANT TO 36 CFR § 800.6(C)
REGARDING THE MUKILTEO MULTIMODAL PROJECT
MUKILTEO, SNOHOMISH COUNTY, WASHINGTON**

WHEREAS, The Washington State Department of Transportation (WSDOT) plans to construct the Mukilteo Multimodal Project (hereafter “the Project”), in order to improve operations, safety and security of the Mukilteo Ferry Terminal; and

WHEREAS, the U.S. Department of Transportation, Federal Transit Administration (FTA) has provided funding during the Project’s planning efforts, and may contribute funding during the Project’s construction; and

WHEREAS, FTA has determined that its approval of the Project is an undertaking, as defined in 36 CFR § 800.16(y), subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 USC § 470 and its implementing regulations, 36 CFR § 800; and

WHEREAS, FTA is the lead federal agency for this undertaking; and

WHEREAS, FTA and WSDOT have consulted with the Washington State Historic Preservation Officer (SHPO), interested and affected Indian tribes, and interested agencies and parties pursuant to 36 CFR § 800.3; and

WHEREAS, FTA and WSDOT, in consultation with SHPO, interested and affected Indian tribes, and other interested parties, have conducted cultural resource inventories and studies to identify and evaluate the effects of the Project upon historic properties located within the Area of Potential Effects (APE) (Attachment 1); and

WHEREAS, access to conduct all possible archaeological investigative testing has been restricted in certain places in the project area due to existing expansive pavement, industrial concrete structures and facilities, buildings, and subsurface utility lines; and

WHEREAS, the Project occurs at a traditional place of camping and gathering referred to as *Beka’ltiu* in the Northern Lushootseed language and recorded archaeologically as the Mukilteo Shoreline Site (45SN393), and the location of the signing of the Point Elliott Treaty of 1855, which has been recorded as site 45SN108; and

WHEREAS, the Project occurs within portions of historic Mukilteo, recorded archaeologically as 45SN404, an area homesteaded in 1860 by Frost and Fowler, the original county seat of

Snohomish County, and the location of the Crown Lumber Company mill, a vital enterprise of the early timber industry in Puget Sound; and

WHEREAS, the Point Elliott Treaty Site (45SN108) is a historic property eligible for the National Register of Historic Places (NRHP) under Criteria A, B, and D, the Old Mukilteo Townsite (45SN404) is a historic property eligible for the NRHP under Criteria A and D, and the Mukilteo Shoreline Site (45SN393) is a historic property eligible for the NRHP under Criteria D; and

WHEREAS, cultural resource inventories have identified several prior construction impacts within the project area that have affected the Mukilteo Shoreline Site (45SN393) and have resulted in some cultural materials being redeposited in disturbed contexts; and

WHEREAS, the Mukilteo Explosive Loading Terminal (MELT) Barracks (MM-04), MELT Pier (MM-02), MELT Firehouse (MM-01), MELT Superintendent's Office (MM-06), DFSP Tank Farm (MM-03), SR 525 Overpass, Diamond Knot Ale House, Ivar's at Mukilteo, and the existing Mukilteo Ferry Terminal (31-339) have been determined not eligible for the NRHP; and

WHEREAS, the Preferred Alternative is sited at the Mukilteo Tank Farm facility, a property encumbered with a historic preservation covenant developed by the United States Air Force (USAF) in consultation with interested and affected Indian tribes, and SHPO; and

WHEREAS, the Preferred Alternative reflects extensive consultation between FTA, WSDOT, SHPO, and interested and affected Indian tribes, conducted specifically to avoid adverse effects to the Point Elliott Treaty Site (45SN108) and the Mukilteo Shoreline Site (45SN393);

WHEREAS, FTA has determined the Project is an undertaking that will result in an adverse effect to the Old Mukilteo Townsite (45SN404); and

WHEREAS, the Advisory Council on Historic Preservation (ACHP) has accepted FTA's invitation to participate in the development of this Agreement; and

WHEREAS, pursuant to 36 CFR § 800.6, FTA and WSDOT consulted with the Lummi Nation, the Muckleshoot Indian Tribe, the Samish Nation, the Sauk-Suiattle Tribe, the Snoqualmie Indian Tribe, the Stillaguamish Tribe, the Suquamish Tribe, the Swinomish Tribal Community, the Tulalip Tribes, and the Upper Skagit Tribe (federally recognized Indian tribes that may attach religious and cultural significance to historic properties potentially affected by the project) and invited them to help identify measures to resolve adverse effects, resulting in the development of this Agreement, and invited them to concur with this Agreement; and

WHEREAS, pursuant to 36 CFR § 800.6, FTA and WSDOT consulted with the USAF, the United States Army Corps of Engineers (USACE), Snohomish County Historic Preservation Commission, City of Mukilteo, Mukilteo Historical Society, City of Everett, Port of Everett, and Historic Everett, and invited them to help identify measures to resolve adverse effects, resulting in the development of this Agreement, and invited them to concur with this Agreement.

NOW, THEREFORE, FTA, SHPO, ACHP, USACE, and WSDOT agree that it is in the public interest to accept the identified effects of the undertaking, and that the undertaking shall be implemented in accordance with the following stipulations to take into account and resolve those adverse effects of the undertaking.

STIPULATIONS

FTA, as the federal agency, is responsible for the implementation of the terms of this Agreement by requiring, as a condition of any approval of federal funding for the Project, adherence to the stipulations set forth herein. WSDOT will have the lead responsibility in the implementation of each stipulation unless otherwise noted in the stipulation.

I. Guiding Principles for Design and Construction for the Mukilteo Shoreline Site (45SN393)

- A. WSDOT shall avoid excavation within the known vertical and horizontal limits of the Mukilteo Shoreline Site (45SN393) with intact archaeological/stratigraphic context. WSDOT shall redesign any elements of the Project that would otherwise require such excavation in order to avoid such impacts.
- B. Notwithstanding Stipulation I.A, if direct excavation impacts cannot be avoided to the Mukilteo Shoreline Site (45SN393) following all feasible avoidance planning and redesign, such impacts may be allowed under an Amendment to this Agreement executed by all Signatory and Concurring Parties.
- C. Direct excavation of the Mukilteo Shoreline Site (45SN393) with intact archaeological/stratigraphic context will not occur without the Amendment described in Stipulation I.B. A necessary party's refusal to sign the Amendment does not constitute a dispute subject to Dispute Resolution as outlined in Stipulation IX.

II. General Requirements and Standards

- A. As a condition of its award of any assistance and of its National Environmental Policy Act (NEPA) Record of Decision, FTA shall require WSDOT to carry out the requirements of this Agreement, and all applicable laws.
- B. Signatories shall keep sensitive cultural resources information confidential to the extent allowed by federal and state law.
- C. Activities carried out pursuant to this Agreement shall meet the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR § 44716 as revised) as well as existing standards and guidelines for historic preservation activities established by SHPO.
- D. FTA and WSDOT will ensure all work carried out under this Agreement is conducted by or under the direct supervision of a person or persons meeting the Secretary of the Interior's Professional Qualification Standards (36 CFR § 61).

- E. All resource management documents specified under Stipulation II.G of this Agreement will be completed prior to construction and with sufficient time to ensure meaningful consultation as outlined in Stipulation II.F. Nothing in this Agreement shall be construed as indicating acceptance by the consulting parties of the resource management documents, which have not yet been developed.
- F. WSDOT shall consult with Agreement Signatory and Concurring Parties at the first and final draft review of all resource management documents with a 30-day review period for comments. Concurrence with the final document(s) will be assumed in the absence of written comment within each respective 30-day comment period.
- G. Resource management documents for this Agreement consist of guiding documents for Project design and construction. These documents will be based on 60% project design to be more effective tools for resource management and thus will not be completed until after this Agreement is executed. These are described in following sections of this Agreement and are:
 - 1. Design Criteria for Cultural Elements;
 - 2. Archaeological Resources Management Plan (hereinafter, "Management Plan"); and,
 - 3. Inadvertent Discovery Plan.
- H. FTA shall retain responsibility for complying with all federal requirements pertaining to direct government-to-government consultation with interested and affected Indian tribes. Notwithstanding any other provision of this stipulation, FTA shall honor the request of any Indian tribes listed herein for direct government-to-government consultation regarding the Project.

III. Point Elliot Treaty Site (45SN108) (*Beka'ltiu*)

WSDOT shall avoid or minimize adverse effects of the Project to the Point Elliot Treaty Site (45SN108) as described below.

- A. Recognizing the continuing importance of the Project area as a traditional place of camping and gathering, and the site of the signing of the Point Elliott Treaty of 1855, design of the Project will be compatible with the historical and cultural significance of that event.
- B. In consultation with interested and affected tribes and other interested consulting parties, WSDOT will prepare a Design Criteria for Cultural Elements reference document to guide principles of building and terminal design compatible with such historical and cultural significance. This document will be developed in advance of construction with sufficient time to conduct meaningful consultation with interested

and affected tribes and other interested consulting parties as outlined in Stipulation II.F.

- C. Design of the Project will utilize context sensitive solutions to incorporate significant historical and cultural themes or events related to the Treaty of Point Elliott as outlined in the Design Criteria for Cultural Elements reference document.
- D. The Design Criteria for Cultural Elements reference document may address, but is not limited to, the following elements:
 - 1. Traditional motifs and objects, and narrative content;
 - 2. Building and facility design, such as landscaping, materials, and form;
 - 3. Commemorative signs, drawings, and photography; and,
 - 4. Public educational displays.

IV. Mukilteo Shoreline Site (45SN393)

WSDOT shall avoid or minimize adverse effects of the Project to the Mukilteo Shoreline Site (45SN393) as described below.

A. Identified Avoidance Measures in Project Design

- 1. WSDOT will avoid excavation within the known vertical and horizontal limits of the Mukilteo Shoreline Site (45SN393) with intact archaeological/stratigraphic context as delineated in the Project Draft Environmental Impact Statement (EIS) Cultural Resources Discipline Report published in January 2012.
- 2. Recognizing the significance that interested and affected tribes place on archaeological deposits regardless of their intact archaeological/stratigraphic context, WSDOT will monitor excavations within areas known to contain previously disturbed portions of the Mukilteo Shoreline Site (45SN393). WSDOT will include specific provisions within the Management Plan to address monitoring and inadvertent discoveries within previously disturbed areas.
- 3. WSDOT shall ensure existing concrete and asphalt will be left in place and sufficient engineered fill will be placed to protect and/or encapsulate areas of the Mukilteo Shoreline Site (45SN393). WSDOT may remove existing concrete and asphalt in order to install utilities or match existing grade only in areas where construction would occur outside of the known horizontal and vertical limits of the intact site.
- 4. WSDOT shall make available design plans and documents to SHPO and interested and affected tribes, which demonstrate that the placement of engineered

fill, stormwater facilities, utilities, or other Project elements will not compromise the existing condition of the areas of the Mukilteo Shoreline Site (45SN393) with intact archaeological/stratigraphic context.

V. Old Mukilteo Townsite (45SN404)

WSDOT shall mitigate adverse effects of the Project to the Old Mukilteo Townsite (45SN404) as described below.

A. WSDOT shall prepare an Archaeological Resources Management Plan. The Management Plan will guide the actions of WSDOT and resource professionals during implementation of the Project. The Management Plan will be developed in advance of construction with sufficient time to conduct meaningful consultation with SHPO, interested and affected tribes, and other consulting parties as outlined in Stipulation II.F. The Management Plan shall include the following:

1. Project Design and Archaeological Research Design

- a. Description of the Project based upon 60% design plans to include clarification of the extent of ground-disturbing actions, engineered fill parameters and other avoidance measures, and design parameters that have the potential to affect intact archaeological resources.
- b. Archaeological Research Design reflecting the information contained in the existing Project DEIS Cultural Resources Discipline Report, and including research goals and relevant context domains. It will describe appropriate archaeological data recovery and monitoring methods and their application to the extant resources.
- c. Curation plan and protocols addressing the collection and permanent curation of all significant archaeological materials recovered during data recovery, monitoring, or testing. The permanent curation facility shall be identified in consultation with SHPO, interested and affected tribes, and consulting parties, and meet the requirements of 36 CFR § 79 and the USAF-developed historic preservation covenant for the Mukilteo Tank Farm property. The Burke Museum shall serve as the temporary curation facility for any materials recovered until the Signatory and Concurring Parties finalize agreement regarding permanent curation.

2. Data recovery plan to mitigate impacts to Old Mukilteo Townsite (45SN404), including treatment of overburden, *in situ* archaeological features, *in situ* artifacts and stratigraphic data, and artifacts in secondary context.
3. Archaeological monitoring plan to guide actions during construction activities, including criteria for appropriate field evaluation of identified or possible artifacts and features, and data recovery treatments of significant resources.

4. Criteria for potential conditions or discoveries during project construction that will require further consultation by FTA and WSDOT with SHPO, interested and affected tribes, and consulting parties.
 5. A plan specific to the potential recovery of human remains to guide personnel and construction actions in the event of the discovery of human remains or potential human remains on the Project site. This plan will require personnel trained in human osteology to be involved in the identification and recovery of human remains. This plan shall comply with RCW 27.44, RCW 68.50, and RCW 68.60; ACHP's Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects; and, requirements of the USAF-developed historic preservation covenant for the Mukilteo Tank Farm property.
- B. WSDOT shall disseminate the findings of the archaeological investigations conducted under the Management Plan to the public by measures developed in consultation with SHPO, interested and affected tribes, and other consulting parties. Such dissemination may be through, but is not limited to:
1. Non-technical report of findings appropriate for a public audience distributed through WSDOT, Mukilteo Historical Society, Historic Everett, or Snohomish County Historic Preservation Commission;
 2. Photography of excavations suitable for public distribution; and,
 3. Public display of historic artifacts in a location to be determined in the Management Plan.

VI. Additional Investigative Testing

- A. In consultation with SHPO and interested and affected tribes, WSDOT may conduct additional investigative archaeological testing to confirm the absence or presence of intact archaeological site deposits to guide continuing project design.
- B. If any design changes or amendments are made to the undertaking that have the potential to cause effects to historic properties outside the current Project footprint, including staging, access, or environmental or other mitigation, WSDOT will conduct cultural resources assessment as required by 36 CFR § 800, to identify and evaluate potential effects upon historic properties, and will consult with SHPO, interested and affected tribes, and other consulting parties to resolve any adverse effects.
- C. If additional investigative testing is conducted prior to the completion and implementation of the Management Plan, all cultural material recovered will be temporarily stored at the Burke Museum or other curation facility approved by the Washington SHPO in accordance with 36 CFR Part 79 and tribal consultation. All

such stored material will be permanently curated at the permanent curation facility identified in the Management Plan.

VII. Tribal Monitoring

At the request of interested and affected tribes, WSDOT shall ensure access to participate directly in Project archaeological monitoring activities.

VIII. Inadvertent Discovery

WSDOT, in consultation with SHPO, interested and affected tribes, and other consulting parties, shall prepare an Inadvertent Discovery Plan (IDP) that specifies notification responsibilities and actions to be taken in the event that human remains or resources other than those identified by previous studies or the Management Plan are found during Project construction. This plan shall comply with RCW 27.44, RCW 68.50, and RCW 68.60; ACHP's Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects; and requirements of the USAF-developed historic preservation covenant for the Mukilteo Tank Farm property.

IX. Memorandum of Agreement Compliance During Construction

- A. WSDOT shall ensure that provisions and stipulations of this Agreement are included, as appropriate, in contracting, procurement, and construction documents.
- B. In consultation with interested and affected tribes, WSDOT shall ensure notification and training of construction site managers, foremen, and other key construction personnel has occurred prior to construction. Training will include explanation of the IDP and relevant construction provisions of the Agreement resource management documents.
- C. WSDOT shall consult with interested and affected tribes prior to contracting with cultural resources consultants that may be necessary to carry out the provisions and stipulations of this Agreement.

X. Dispute Resolution

- A. The Signatories to this Agreement are the parties authorized to address and informally resolve disagreements to its implementation, and they agree to use their best efforts to do so.
- B. Should any Signatory or Concurring Party to this Agreement object at any time to any actions or manner of implementation, the Signatory Parties will consult with such party within ten days in an attempt to resolve the objection.
- C. In the event that any Signatory or Concurring Party to this Agreement objects to any plan or report presented for the Project pursuant to this Agreement within 30

calendar days of its receipt, WSDOT will consult further with the objecting Signatory or Concurring Party to seek resolution. If WSDOT is unable to reach resolution with respect to the Project, WSDOT will notify FTA, which in turn will consult with the objecting party to seek resolution with respect to the Project.

- D. At any time during implementation of the activities covered in this Agreement, should a member of the public raise an objection pertaining to this Agreement or the effect of the Project on historic properties, FTA will notify the Signatory and Concurring Parties to this Agreement and take the objection into account, consulting with the objector and with any other Signatory or Concurring Parties to this Agreement as appropriate to resolve the objection.
- E. FTA's responsibilities to carry out all other actions subject to the terms of this Agreement that are not the subject of the dispute remain unchanged.
- F. All Signatory and Concurring Parties to this Agreement commit to acting in good faith to carry out the commitments and to resolve any disputes related to the implementation of this Agreement.
- G. Each Signatory or Concurring Party to this Agreement reserves any and all rights it may otherwise have to enforce its rights or seek resolution of the dispute under applicable law. Nothing in this agreement can be construed as being a waiver of the sovereign immunity of any Federally-recognized tribe.

XI. Amendment and Termination

- A. This Agreement may be amended when such an amendment is agreed to in writing by all Signatories. The parties shall use their best efforts to expedite decisions on proposed amendments. An amendment will be effective on the date a copy signed by all the Signatories is filed with FTA.
- B. If FTA or WSDOT proposes to amend this Agreement, the Management Plan, or other required Agreement documents in a manner that alters the resolution of adverse effects to historic properties, the modification will be made in consultation with SHPO, interested and affected tribes, and other consulting parties. The amended Agreement must be signed by all Signatories to the original Agreement.
- C. Unless terminated, this agreement is in effect until November 2019, or the end of Project construction, or such time as FTA, in consultation with all Signatory and Concurring Parties, determines that all of its terms have been satisfactorily fulfilled, whichever is later.
- D. In addition to Stipulations X.C and X.D, any Signatory of this agreement may terminate it by providing 30 calendar days written notice to the other parties, provided that all Signatory and Concurring Parties will consult during the 30-day

period prior to termination to seek agreement on amendments or other actions that would avoid termination.

- E. In the event of termination, FTA shall comply with 36 CFR § 800 for all remaining actions under this Agreement.

SIGNATORIES:

Federal Transit Administration

Date

R. F. Krochalis
Regional Administrator

Washington State Department of Transportation

Date

David H. Moseley
Assistant Secretary for Washington State Ferries

State Historic Preservation Officer

Date

Allyson Brooks, Ph.D.

Advisory Council on Historic Preservation

Date

John M. Fowler
Executive Director

United States Army Corps of Engineers

Date

Bruce A. Estok, COL
Commanding

CONCURRING:

Upper Skagit Tribe of Washington

Date

Honorable Chairperson Jennifer Washington

Tulalip Tribes of the Tulalip Reservation

Date

Honorable Chairman Melvin Sheldon, Jr.

Swinomish Tribe of the Swinomish Reservation

Date

Honorable Chairman Brian Cladoosby

Suquamish Tribe of the Suquamish Reservation

Date

Honorable Chairman Leonard Forsman

Stillaguamish Tribe of Washington

Date

Honorable Chairman Shawn Yanity

Snoqualmie Tribe

Date

Honorable Chairperson Shelley Burch

Sauk-Suiattle Indian Tribe of Washington

Date

Honorable Chairperson Norma Joseph

Samish Indian Tribe

Date

Honorable Chairman Tom Wooten

Lummi Nation of the Lummi Reservation

Date

Honorable Chairman Tim Ballew, II

City of Mukilteo

Date

Joe Marine
Mayor

City of Everett

Date

Ray Stephanson
Mayor

Port of Everett

Date

John Mohr
Executive Director

Historic Everett

Date

Sarah M. Church
President

